

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 228 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed :  
to see the judgements?
  2. To be referred to the Reporter or not? :
  3. Whether Their Lordships wish to see the fair copy :  
of the judgement?
  4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge? : NO

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BASIRKHAN AHMADKHAN

Versus

BAI PUNJA WIFE OF MANIBHAI MOTIBHAI  
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Appearance:

MR RN SHAH for appellants.

MR MI PATEL for Respondent No. 1 to 6.

No appearance for Respondents Nos.7/1 to 7/5.  
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CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 18/02/2000

ORAL JUDGEMENT

The respondents No. 1 to 6 filed Regular Civil Suit No. 178 of 1976 in the Court of the Civil Judge (JD), Borsad, for declaratory as well as injunctive relief and also for the recovery of the amount of compensation received by the present appellants. On 28th August 1980, the suit was dismissed. The respondents No. 1 to 6, therefore, preferred Regular Civil Appeal No. 186 of 1980 in the District Court, Kheda at Nadiad, which was assigned to the then learned 2nd Extra Assistant

Judge, Nadiad, who, hearing the parties, partly allowed the appeal. The declaratory relief was granted, while rest of the reliefs were refused. The appellants, who are original-defendants No. 2 & 3 in the suit, have, therefore, preferred the present Appeal.

2. Few facts may be stated. In the suit, the original-plaintiffs (respondents No. 1 to 6) came out with the case that their ancestor was Motibhai Datarbhai, who died years back. He was having the properties, of them agricultural lands bearing Survey No. 1/672 and 2/672 were also there. He died leaving three sons, namely, (1) Manibhai, (2) Dahyabhai, and (3) Shankarbhai. Each of the three sons was having 1/3rd share in the joint properties left by Motibhai Datarbhai. The respondents No. 1 to 6, who are the heirs of Manibhai, therefore, became the co-owners of the properties left by Motibhai Datarbhai. However, the name of Dahyabhai, through whom the respondents No. 7/1 to 7/5 claim, was mutated in the record. He, therefore, took disadvantage of the mutation entry made in his favour and sold the agricultural land bearing No. 1/672 to the present appellants on 10th September 1968 without any consideration so as to grab the fields. The respondents No. 1 to 6, who claim through Manibhai Motibhai, then filed Regular Civil Suit No. 178 of 1976 in the Court of the Civil Judge (JD), Borsad, for a declaration that the sale deed executed by Dahyabhai Motibhai in favour of the present appellants was not binding to them and for a permanent injunction as well as for the recovery of 1/3rd amount from the total amounts of compensation the appellants received after the land was acquired. The then learned Civil Judge (JD), Borsad, appreciating the evidence before him on 22nd August 1980, dismissed the suit holding that the suit property was the ancestral property once in past belonging to Motibhai Datarbhai. The respondents No. 7/1 to 7/5 had become owners by adverse possession. The respondents No. 1 to 6 were not having any share in the property, and they were not entitled to the amount of compensation. He also held that the suit was barred by the period of limitation. The respondents No. 1 to 6 then carried the matter in appeal before the District Court, Kheda at Nadiad. Their appeal being Regular Civil Appeal No. 186/80 was partly allowed by the then learned Second Extra Assistant Judge at Nadiad, holding that the learned trial Judge erred in holding that the respondents No. 1 to 6 were having no undivided share in the suit property, and that deceased Dahyabhai Motibhai had a right to sell the suit property. He therefore partly allowed the appeal granting the declaratory relief, but refused to

grant rest of the reliefs. It is against that judgments and decree, the present appeal is preferred before this Court.

3. The respondents No. 7/1 to 7/5, on being served with the summons, appeared before the trial Court and filed their written statement at Ex. 19 contending, inter alia, that the case pleaded in the plaint was not true. The properties belonged to deceased Motibhai Datarbhai were partitioned in 1950. Since the day of partition, Dahyabhai Motibhai through whom they claim became the sole owner of the suit property. He being the absolute owner had a right to dispose of the said property. He therefore on 10th September 1968 sold the field in question to the present appellants executing the Sale Deed dated 10th September 1968. The suit was also barred by the period of limitation etc.,.

4. This being the Second Appeal, the jurisdiction of this Court is very limited. This Court would not interfere with the concurrent findings on facts arrived at by both the Courts, and would not enter into the merits of the factual aspect of the case even though lower courts have erred in drawing the conclusions. This Court can inquire into the merits of the substantial question of law if raised and decide whose contention out of two rival contentions is acceptable. If the evidence is misread or if the evidence on record & issue are totally ignored, resulting into miscarriage of justice, the same would amount to substantial question of law. To put in different words, 2nd appeal can be entertained & decided only if it involves substantial question of law, and not simple one.

5. The learned advocate representing the appellants, therefore, confined to the only question of law, though in memo of appeal several other questions are formulated for the decision of this Court. He, after the query was made, confined to the only question regarding limitation. According to him, the suit was barred by the period of limitation. The then learned Civil Judge (JD) was perfectly right in holding that the suit was barred by the period of limitation, but the then learned Second Extra Assistant Judge failed to consider the question regarding limitation, though submissions were made, and ignoring the same totally he allowed the appeal, which was the serious error, eventuating miscarriage of justice.

6. In view of such submission, the only point, which is required to be dealt with, is regarding the issue of

limitation. When judgment of the lower appellate Court is perused, it is clear that the appellate Court has totally ignored the issue about limitation though submission was made. There is therefore miscarriage of justice and substantial question of law can be said to have been involved. The suit for declaratory as well as injunctive relief is filed. The respondents No. 1 to 6 have filed the suit for a declaration that the sale deed executed on 10th September 1968 by Dahyabhai Motibhai is not binding to them and their 1/3rd share in the joint property is not at all affected in any manner. When such declaratory relief is sought for, Article 58 of the Indian Limitation Act would come into play. As per that Article, the period for filing the suit provided is 3 years and the period of 3 years begins to run when the right to sue first accrues. Ordinarily, the right to sue will accrue in such case when the document is registered or executed, but if the party is not knowing about the execution, the period would begin to run from the day the party comes to know about the execution of the document. It appears that the respondents No. 1 to 6 were not knowing about the execution of the document on the day the sale deed came to be executed. On what day they came to know has to be determined for which evidence of Melabhai Manibhai, Ex.95, which is referred to by the learned trial Judge, is material. In the cross-examination, he has admitted that the appellants had been to him for taking the possession after the document was executed and they had gone to them about 12 years prior to the day on which he deposed. He deposed in July 1980. It, therefore, follows that in 1968, the respondents No. 1 to 6 came to know about the execution of the sale deed, but later on the date about the knowledge is qualified mentioning that the appellants had gone to them 2 to 3 years after the execution of the sale deed. If that is so, the appellants must have gone to respondents No. 1 to 6 in the year 1971 or at least in 1972. The respondents No. 1 to 6 must have, therefore, if liberal view is taken, come to know in 1972 latest. The period of limitation hence began to run therefrom, and so the same expired in 1975. The suit is filed on 6th August 1976. It, therefore, follows that the suit is filed after the period of 3 years was over. The suit is, therefore, barred by the period of limitation. The learned trial Judge was, therefore, perfectly right in holding that the suit was barred by the period of limitation, but the learned Assistant Judge fell into error in this regard. He has totally ignored the point, though on this point party submitted, and passed the decree. Not to deal with the issue & consider evidence thereof amounts to miscarriage of justice. Consequently,

here is a case where, the lower appellate Court has erred, ignoring the issue regarding limitation going to the root of the case.

7. When it is found, for the aforesaid reasons, that suit is barred by the period of limitation, but the learned Second Extra Assistant Judge has passed the decree, the decision rendered by the learned Judge, in appeal, is required to be set aside and the suit is required to be dismissed. The decree passed by the learned Civil Judge (JD), Borsad, is required to be restored.

8. For whatever I have said hereinabove, the appeal is allowed. The judgment and decree passed by the learned Second Extra Assistant Judge, Kheda at Nadiad in Regular Appeal No. 186 of 1980, are hereby quashed and set aside and the judgment and decree passed by the learned Civil Judge (JD), Borsad, is hereby restored. Decree be drawn accordingly.

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